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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. PAUL LYNCH, Defendant and Appellant.	D071882 (Super. Ct. No. SCD265745)

APPEAL from a judgment of the Superior Court of San Diego County, Robert F. O'Neill, Judge. Affirmed as modified.

Patrick Dudley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, A. Natacha Cortina and Amanda E. Casillas, Deputy Attorneys General, for Plaintiff and Respondent.

Paul Lynch pleaded guilty to one count of assault by means likely to cause great bodily injury (Pen. Code,[1] § 245, subd. (a)(4)). The trial court sentenced him to credit for time served and placed him on three years of formal probation with multiple conditions. Lynch challenges four of the probation conditions, contending they are overbroad, unreasonable, and/or violate his constitutional rights. The People concede that one of the conditions—barring Lynch's presence at places where alcohol is the main item for sale—should be stricken. We agree, and modify the probation order to strike that condition. We otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

In February 2016, Lynch hit his long-time neighbor in the face with a glass bottle after they argued and the neighbor called him vulgar names. When police arrived, Lynch was uncooperative and unwilling to leave his residence. The neighbor admitted to "start[ing] the whole thing" after getting "pissed" and "belligerent," and related that Lynch wanted to be left alone and did not want problems. Lynch stated he hit the neighbor in self-defense.

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1 Statutory references are to the Penal Code unless otherwise specified.

2 The factual basis for Lynch's guilty plea was that he "did commit an assault by means likely to cause great bodily injury." We state the background facts of the offense from the probation report. The probation report identifies Lynch as male, but the probation officer observed during his interview that he dressed as a woman and preferred to be called "Star." The victim also referred to Lynch alternatively as male and female. We refer to Lynch with a masculine pronoun.

Following Lynch's guilty plea, the probation officer issued a report recounting Lynch's acceptance of responsibility for the present offense as well as his lengthy juvenile and adult criminal history. He stated Lynch was presumptively ineligible for probation given his previous felony convictions. The officer nevertheless pointed out that the parties had stipulated to a grant of probation, and he recommended Lynch be placed on three years of formal probation with various conditions, including that Lynch obtain probation officer approval as to his residence (condition 10g), and submit his person, vehicle, residence, property, personal effects, computers, and recordable media to search at any time (condition 6n). The probation officer additionally recommended some alcohol and marijuana conditions, specifically, that Lynch not knowingly use or possess alcohol if directed by his probation officer (condition 8b) or be in places other than in the course of employment where alcohol is the main item for sale (condition 8h), that Lynch submit to chemical testing for blood alcohol content upon request (condition 8f), and that he not use marijuana at all, with or without a prescription or recommendation (condition 14a).

The probation officer evaluated Lynch under the COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) assessment tool. The assessment found Lynch "would benefit from some guidance and monitoring in the community via probation supervision and referrals to community resources," and factors to be addressed were his history of noncompliance and violence, his current violence, and his "criminal personality."

At Lynch's sentencing hearing, the court considered Lynch's counsel's arguments concerning the probation officer's recommended probation conditions. Defense counsel did not object to the alcohol use restriction or requirement for chemical testing for blood alcohol content, but did object to conditions 6n and 8h on grounds they had no nexus to the case, and also to condition 14a, asking the court to permit Lynch to use marijuana if Lynch was determined to have a medical condition requiring a recommendation for such use. As for condition 6n's requirement for searches of Lynch's computers and recordable media, the court stated, "[W]ithout even knowing if your client has a computer or whatever, that's a standard term and condition of probation to monitor probationers." It invited Lynch to put the issue on calendar if a specific problem arose, and observed in response to counsel's further arguments that the issue might become moot depending on legal developments. The court overruled the remaining objections, and ordered that Lynch be subject to all of the probation conditions described above. Lynch accepted probation on all the imposed terms and conditions.

DISCUSSION

I. *Legal Principles and Standard of Review*

A grant of probation " 'is not a right, but a privilege' " (*People v. Moran* (2016) 1 Cal.5th 398, 402) and a trial court has broad discretion to choose probation in sentencing a criminal offender. (*Ibid*.) Reviewing courts defer to the court's choice absent a manifest abuse of that discretion. (*Ibid*.)

"When an offender chooses probation, thereby avoiding incarceration, state law authorizes the sentencing court to impose conditions on such release that are 'fitting and

proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and . . . for the reformation and rehabilitation of the probationer.' (§ 1203.1, subd. (j).) Accordingly, . . . a sentencing court has 'broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to . . . section 1203.1.' [Citation.] But such discretion is not unlimited: '[A] condition of probation must serve a purpose specified in the statute,' and conditions regulating noncriminal conduct must be ' "reasonably related to the crime of which the defendant was convicted or to future criminality." ' " (*People v. Moran*, *supra*, 1 Cal.5th at pp. 402-403.) Our state's high court has stated that a probation condition " 'will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." ' " (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*), quoting *People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*); *People v. Trujillo* (2017) 15 Cal.App.5th 574, 583 (*Trujillo*), review granted Nov. 29, 2017, No. S244650; *In re J.B.* (2015) 242 Cal.App.4th 749, 754.) A reviewing court can invalidate the condition only if all three prongs—referred to as the *Lent* factors—are met. (*Olguin*, at p. 379.)

A reviewing court can also invalidate probation conditions if they are unconstitutionally overbroad, that is, if they impose limitations on a person's constitutional rights that are not closely tailored to the purpose of the condition. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 890; *People v. Stapleton* (2017) 9 Cal.App.5th 989, 993.) " 'A restriction is unconstitutionally overbroad . . . if it (1) "impinge[s] on

constitutional rights," and (2) is not "tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation." [Citations.] The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.' " (*Stapleton*, at p. 993; *People v. Appleton* (2016) 245 Cal.App.4th 717, 723.)

Appellate courts generally review probation conditions for abuse of discretion. (*People v. Moran*, *supra*, 1 Cal.5th at p. 403; *People v. Appleton*, *supra*, 245 Cal.App.4th at p. 723.) "That is, a reviewing court will disturb the trial court's decision to impose a particular condition of probation only if, under all the circumstances, that choice is arbitrary and capricious and is wholly unreasonable." (*Moran*, at p. 403.) But constitutional challenges, such as a claim that a condition is overbroad, are reviewed de novo. (*People v. Stapleton*, *supra*, 9 Cal.App.5th at p. 993; *Appleton*, at p. 723.)

II. *Residence Approval Condition*

Lynch contends probation condition 10g, which requires him to obtain probation officer approval of his residence, is overbroad and impinges on his right to travel and freedom of association under the First Amendment. Lynch admits he did not object to the probation officer's recommendation for the condition or its imposition by the trial court. He nevertheless contends that his constitutional challenge is not forfeited because it is a pure question of law that can be resolved without regard to his sentencing record. The People respond that Lynch forfeited the claim by his failure to object; that in order to

determine whether the condition is overbroad, this court must refer to the record including his criminal and social history.

We agree with the People. The mere fact that Lynch has advanced a constitutional challenge does not permit us to review it for the first time on appeal. We acknowledge that the California Supreme Court has recognized that the general forfeiture rule does not apply to a facial challenge to the constitutionality of a probation condition. (*In re Sheena K.*, *supra*, 40 Cal.4th at pp. 887-889.) However, it cautioned that its conclusion "does not apply in every case in which a probation condition is challenged on a constitutional ground. . . . [W]e do not conclude that 'all constitutional defects in conditions of probation may be raised for the first time on appeal, since there may be circumstances that do not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." [Citation.] In those circumstances, "[t]raditional objection and waiver principles encourage development of the record and a proper exercise of discretion in the trial court." ' " (*Id*. at p. 889.) The court emphasized that "generally, given a meaningful opportunity, the probationer should object to a perceived facial constitutional flaw at the time a probation condition initially is imposed in order to permit the trial court to consider, and if appropriate in the exercise of its informed judgment, to effect a correction." (*Ibid*.)

In arguing the residence approval probation condition here is overbroad and must be stricken or modified, Lynch asserts that the condition "has nothing to do with the circumstance of the instance offense," "has nothing to do with any potential future criminality," and unduly impinges on his right to travel and freedom of association. He

relies on *People v. Bauer* (1989) 211 Cal.App.3d 937, in which the appellate court rejected a residence approval requirement in part because the probation report did not suggest the defendant's home life contributed to the crime of which he was convicted or was reasonably related to future criminality. (*Id*. at p. 944.) Because Lynch's challenge asks us to review the record of his criminality and the circumstances of his current offense to assess constitutional overbreadth, the matter does not present a pure question of law, and the forfeiture doctrine applies. (See *In re Sheena K.*, *supra*, 40 Cal.4th at pp. 885, 887 [challenge to a probation term on grounds of overbreadth that is capable of correction *without reference to the particular sentencing record developed in the trial court* can be said to present a pure question of law].) Under the circumstances, a timely objection would have allowed the court to modify or delete an allegedly unreasonable condition or to explain why it is necessary in the particular case. (*People v. Welch* (1993) 5 Cal.4th 228, 235.) "A rule foreclosing appellate review of claims not timely raised in this manner helps discourage the imposition of invalid probation conditions and reduce the number of costly appeals brought on that basis." (*Ibid*.)

We cannot construe Lynch's claim as a facial challenge that does not require scrutiny of the sentencing record. Lynch makes no reasoned argument that the condition is inappropriate in all circumstances or overbroad in the abstract. To the contrary, a probation officer's discretion to approve a probationer's residence must be guided by the goal of reformation and rehabilitation (see *People v. Stapleton*, *supra*, 9 Cal.App.5th at pp. 993), and the officer "cannot use the residence condition to arbitrarily disapprove a defendant's place of residence." (*Id*. at p. 996.) Indeed, courts presume a probation

officer will not withhold approval for irrational or capricious reasons, and have observed the condition on its face "does not grant a probation officer the power to issue arbitrary or capricious directives that the court itself could not order." (*Ibid*.) We need not further address the matter, since absent a complete record, this court should exercise restraint and decline to decide the issue on a constitutional basis. (See *County of Los Angeles v. Williamsburg National Insurance Company* (2015) 235 Cal.App.4th 944, 954-955 [appellate court will not reach constitutional questions unless absolutely required to do so to dispose of the matter].)

III. *Computers and Recordable Media Search (Condition 6n)*

Lynch contends the court erred by imposing probation condition 6n to the extent it requires him to submit his "computers[] and recordable media . . . to search at any time with or without a warrant, and with or without probable cause," when required by his probation officer or a law enforcement officer. Comparing his case to *In re Erica R.* (2015) 240 Cal.App.4th 907 and distinguishing *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, in which the court upheld a similar condition in a case involving a gang related crime and defendant's admission to a gang allegation (*Ebertowski*, at pp. 1172-1173, 1176-1177), he maintains the condition is unreasonable under *Lent*. Lynch further argues the condition is so overbroad as to impinge on his Fourth Amendment right to privacy.

Apparently conceding the condition does not relate to Lynch's crime and targets conduct that is not itself criminal, the People argue in response that the condition is valid under *Lent* because it is reasonably related to reducing future criminality. According to

them, in view of Lynch's lengthy and violent criminal history as well as his poor performance on probation, the condition relates to Lynch's supervision and rehabilitation by helping the probation department ensure he refrains from committing future crimes. The People further argue the electronics search condition is not overbroad because it allows the close supervision of probationers to ensure they comply with their probation terms, and thus is closely tailored to the compelling state interest in reforming and rehabilitating defendants.

As stated, the probation officer's report reflects Lynch's lengthy criminal history. It began in early 1992, when as a juvenile Lynch was found to have committed an attempted robbery after he threatened a man at a trolley stop with a gun, demanded his money, then hit him in the face. Months later, Lynch violated his juvenile probation after he threatened to kill staff members at his group home, and he was returned to Juvenile Hall. At the end of 1992, as an adult, Lynch received probation for committing a misdemeanor burglary (stealing from a neighbor's car after breaking its window with a rock), but later had his probation revoked and reinstated. In 1993, he kicked a woman at a trolley stop, then punched and shot a man who came to the woman's aid, resulting in the man's death due to complications from the gunshot wound. As a result, Lynch pleaded guilty to a felony (among other crimes), admitted a gun use allegation, and was sentenced in 1995 to 16 years in state prison. In 2005, Lynch pleaded nolo contendere to falsely reporting an emergency and placed on probation after he ran from police while being taken into custody on a domestic violence related warrant, then threatened to make false 911 calls. In 2006 he was convicted of similar misdemeanor charges and again placed on

probation. That year and in 2007, Lynch committed parole violations and was returned to prison. In 2009, he pleaded nolo contendere to obstructing an officer and was placed on probation, which was revoked and reinstated at least twice that year.[3] In 2012, Lynch was placed on probation after pleading guilty to spousal battery after pushing his wife against a fence and fighting with her. He received another grant of probation after pleading guilty to misdemeanor theft in 2014. Lynch's probation was revoked at least twice in 2014, before he committed the present offense in February 2016. The probation officer observed that Lynch had previously been granted probation 11 times and was on two active grants at the time of his 2016 arrest; that given his criminal history, "his prior performance on juvenile and adult probation and parole was poor."

This court recently addressed a challenge by a defendant subjected to an electronics search probation condition in *Trujillo, supra*, 15 Cal.App.5th 574, which we discuss in detail for its persuasive value. (Cal. Rules of Court, rule 8.1115(e)(1).) The defendant's crime, like Lynch's here, had no relation to the probation condition, and the main issue as here was whether the condition was reasonably related to future criminality.

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3 In 2012, Lynch's 2005, 2006 and 2009 convictions were set aside and his cases dismissed under section 1203.4. "Generally, section 1203.4 'allows for probationers to have their convictions set aside and the accusations against them dismissed, and similarly provides that, with specified exceptions, such a defendant "shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted." ' (*People v. Mgebrov* (2008) 166 Cal.App.4th 579, 584, quoting *People v. Vasquez* (2001) 25 Cal.4th 1225, 1228.) " ' "A grant of relief under section 1204.3 is intended to reward an individual who successfully completes probation by mitigating some of the consequences of his conviction and, with a few exceptions, to restore him to his former status in society to the extent the Legislature has power to do so." ' " (*People v. Mgebrov*, at p. 584.) But section 1203.4 does not expunge the conviction or render it a legal nullity. (*People v. Seymour* (2015) 239 Cal.App.4th 1418, 1429.)

We explained that "a probation condition 'that enables a probation officer to supervise his or her charges effectively *is* . . . "reasonably related to future criminality." ' " [Citations.] Because the probation officer is responsible for ensuring the probationer refrains from criminal activity and obeys all laws during the probationary period, the court may appropriately impose conditions intended to aid the probation officer in supervising the probationer and promoting his or her rehabilitation. [Citations.] 'This is true "even if [the] condition . . . has no relationship to the crime of which a defendant was convicted." ' " (*Id*. at p. 583.)

In *Trujillo*, the defendant's crimes were first-time offenses, but his record showed he had substantial risk factors relevant to reoffending, and we observed the trial court had imposed the condition aware of these facts and the probation department's conclusion that he was at risk and would require close supervision of his daily activities to support a successful probation. (*Trujillo*, *supra*, 15 Cal.App.5th at p. 583.) The trial court had found that in order to supervise the defendant, the probation department needed to be able to view the contents of his computer and cell phone, and thus we pointed out it "did not impose this condition as a matter of routine, but considered the specific facts relevant to Trujillo's case." (*Ibid*.) Under the circumstances, we held the court did not abuse its discretion: "If the court permits this young convicted felon to avoid prison through probation despite his violent offenses, the court has the authority to take steps to help ensure Trujillo will remain crime free and that public safety objectives are satisfied. As our high court has observed, the purpose of requiring Fourth Amendment search waivers as a probation condition is 'to determine not only whether [the probationer] disobeys the

law, but also whether he obeys the law. Information obtained [from an unexpected and unprovoked search] afford[s] a valuable measure of the effectiveness of the supervision given the defendant . . . .' [Citations.] The trial court had a reasonable basis to conclude the most effective way to confirm Trujillo remains law-abiding is to permit his electronic devices to be examined, rather than relying on a meeting or a telephone conversation. This required Fourth Amendment waiver is not open-ended, it applies only during the probation period. If Trujillo is successful at his probation, the Fourth Amendment waiver will terminate and his electronic devices will again be completely private. The court made the factual determination that the electronics-search condition is necessary to provide appropriate supervision for Trujillo while he is on probation. Under *Lent* and *Olguin*, the court did not err in reaching this conclusion." (*Id*. at pp. 583-584.)

We further rejected the notion—suggested in cases such as *In re Erica R.*, *supra*, 240 Cal.App.4th 907, on which Lynch relies[4]—that the *Trujillo* defendant's failure to use an electronic device in committing his crimes or the lack of any connection between such a device and the crimes rendered the search condition unreasonable as a matter of law. (*Trujillo*, *supra*, 15 Cal.App.5th at p. 584.) As we explained, whether a condition is reasonably related to reducing future criminality requires a focus on the particular facts and circumstances, not bright-line rules; that the propriety of a specific probation

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4 In *Erica R.*, a juvenile probation case, Division Two of the First District Court of Appeal struck an electronics search condition where there was no evidence suggesting the minor, who was convicted of misdemeanor possession of ecstasy, ever used her cell phone to negotiate the purchase or sale of an illegal substance. (*In re Erica R.*, *supra*, 240 Cal.App.4th at pp. 912-913.)

condition "necessarily depends on a myriad of tangible and intangible factors before the trial court, including the defendant's particular crime, criminal background, and future prospects. It is for the trial court, with the assistance of the probation officer and other experts, to determine the probation conditions that will permit effective supervision of the probationer." (*Trujillo, supra,* 15 Cal.App.5th at p. 584.) And it was this court's role to decide whether the lower court had a reasonable factual basis to decide the condition would assist probation in supervising the defendant. (*Id*. at pp. 584-585.) In *Trujillo*, the facts supported the conclusion that the trial court's decision did have such a basis.

We are persuaded by *Trujillo's* reasoning and apply it in this case. Though the trial court here acknowledged that the condition was "standard . . . to monitor probationers," *Trujillo*'s outcome did not turn on whether the trial court perceived the condition to be standard or routine, but rather on its finding—knowing the defendant's history and risk factors—that the condition was necessary to provide appropriate supervision for the defendant while he was on probation. Here, the court had before it the probation report recounting Lynch's lengthy criminal history and the probation department's conclusions as to the factors—Lynch's history of non-compliance on probation, his past and current violence, and his criminal personality—that had to be addressed by the probation officers to reduce the chances of his reoffending. As in *Trujillo*, here the court had reasonable grounds to conclude that an effective way to confirm Lynch remains compliant and law-abiding during his period of supervision is to permit his electronic devices to be examined, rather than merely relying on meetings or telephone conversations. Because the electronics search condition is reasonably related

to Lynch's supervision, it is reasonably related "to his rehabilitation and potential future criminality." (*People v. Olguin*, *supra*, 45 Cal.4th at p. 380.) We conclude the court did not abuse its discretion in ordering the condition under *Lent*, *supra*, 15 Cal.3d 481.

Additionally, as we did in *Trujillo*, we reject Lynch's argument that the electronics search condition is unconstitutionally overbroad as violating his fundamental privacy rights under *Riley v. California* (2014) 573 U.S. ___ [134 S.Ct. 2473]. Lynch suggests we should follow the decisions invalidating the condition as overbroad in *Malik J.* (2015) 240 Cal.App.4th 896, *People v. Appleton*, *supra*, 245 Cal.App.4th 723, and *In re P.O.* (2016) 246 Cal.App.4th 288. He argues the condition is not narrowly tailored to his individualized situation, pointing to the trial court's statement that it was a "standard term and condition of probation" and the fact there was no record of a computer or electronic device involved in his offense. In *Trujillo*, we distinguished *Riley*, and followed authority explaining that the overbreadth analysis is materially different from the warrant requirement at issue in that case. (*Trujillo*, *supra*, 15 Cal.App.5th at p. 587.) We observed that probationers do not enjoy the absolute liberty to which law-abiding citizens are entitled, and that courts routinely uphold broad probation conditions permitting searches of a probationer's residence without a warrant or reasonable cause. (*Id*. at pp. 587-588.) Like the defendant in *Trujillo* (*id*. at pp. 588-589), Lynch does not challenge the probation condition authorizing officers to conduct random and unlimited searches of his residence at any time and for no stated reason, and he made no showing that a search of his electronic devices would be any more invasive than an unannounced, without-cause, warrantless search of his residence. Here, as in *Trujillo*, the factual record

supports a conclusion that the electronics-search condition is necessary to protect public safety and to ensure Lynch's rehabilitation during his three-year supervision period, and a routine search of Lynch's electronic data "is strongly relevant to the probation department's supervisory function." (*Id*. at p. 588.) We adopt a similar conclusion as *Trujillo*: "Absent particularized facts showing the electronics-search condition will infringe on [Lynch's] heightened privacy interests, there is no reasoned basis to conclude the condition is constitutionally overbroad or to remand for the court to consider a more narrowly-drawn condition." (*Id*. at p. 589.)

IV. *Marijuana Abstinence Condition*

In imposing probation condition 14a, under which Lynch is not to "use marijuana at all with or without a prescription or recommendation," the court stated: "If a doctor were to prescribe it properly, et cetera, and probation does not agree with that, you can put it on calendar." Lynch contends the condition as imposed is unreasonable because it does not meet any of the three *Lent* factors: it has no relationship to his crime, relates to conduct that is not itself criminal, and is not reasonably related to future criminality.[5]

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[5] Lynch presented no evidence that he has ever had a prescription or medical need for marijuana use, or that he expects to have such a need during the term of his probation. Presumably because he does not have Compassionate Use Act (CUA; Health & Saf. Code, § 11362.5) authorization for medicinal use (see *People v. Kelly* (2010) 47 Cal.4th 1008, 1012-1013), Lynch does not cite or discuss *People v. Leal* (2012) 210 Cal.App.4th 829 in which the Court of Appeal set forth a three-step inquiry to assess the propriety of a probation condition forbidding the defendant from all marijuana use including medical use. (*Id*. at p. 833.) Under *Leal*, the court (1) examines the validity of any CUA authorization; (2) applies the *Lent* test for interfering with such authorization; and (3) considers "competing policies governing the exercise of discretion to restrict CUA use." (*Leal*, at p. 837.) Lynch applies only the *Lent* test here.

The People respond that imposition of the condition was within the court's discretion as it promotes a probationer's reformation and rehabilitation, and thus serves to deter future criminality. They additionally argue that the condition was proper as use and possession of marijuana is illegal under federal law, federal law does not contain a medical necessity defense, and Lynch was already subject to a condition requiring him to obey all laws.

Concededly, the probation officer noted that Lynch denied that he used drugs or alcohol and had never been to a treatment program. There is no indication drugs or marijuana in particular played any role in Lynch's present or prior offenses. However, Lynch is subject to a condition that he "[o]bey all laws." Possession of marijuana by a private person, even by a medical user, remains illegal under federal law. (21 U.S.C. §§ 812, schedule I(c)(10), 844(a); see *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 923; *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 811-812; *People v. Bianco* (2001) 93 Cal.App.4th 748, 753.) Thus, in *People v. Bianco*, the Third District Court of Appeal held that a probation condition prohibiting the use or possession of marijuana "was in effect ordering defendant to obey the law of the United States" and thus "was reasonably directed a defendant's future criminality." (*Id*. at p. 753.) We reach the same conclusion here.[6]

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6 In *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, the Third District Court of Appeal disagreed with its prior opinion in *People v. Bianco*, *supra*, 93 Cal.App.4th 748 in a probation revocation context, and held medical necessity under the CUA was a defense to probation revocation. (*Tilehkooh*, at p. 1441.) The *Tilehkooh* court rejected the argument that the defendant was required to comply with federal drug laws, reasoning that "the state does not punish a violation of the federal law 'as such,' " and thus could

Additionally, we have pointed out that Lynch has a lengthy prior criminal history, demonstrating repeated instances of violent behavior, reoffending and poor performance on supervision. The probation officer specifically found that Lynch suffered from a "criminal personality," suggesting a heightened need for meaningful supervision. In view of his violent offenses and his past criminal behavior and tendencies, Lynch has not shown the court clearly abused its discretion in ordering him to abstain from marijuana use, regardless of a prescription, so as to promote his rehabilitation and prevent future criminality. That is, the trial court could have reasonably concluded Lynch's sobriety and abstention from marijuana use was critical to his ability to remain law-abiding, his rehabilitation and successful completion of probation, notwithstanding the lack of any history of use. As marijuana use may impair Lynch's judgment and in view of his propensity to make poor and impulsive decisions, the court was within its discretion to subject all such use, including any future recommendation or prescription for Lynch to

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"only reach conduct subject to the federal criminal law by incorporating the conduct into the state law." (*Id.* at 1446.) The court observed that the People did not claim they were enforcing a federal criminal sanction attached to the federal marijuana law, but rather were seeking to enforce the state sanction of probation revocation, which was solely a creature of state law. (*Ibid*.) Accordingly, it held that the prosecution could not revoke the defendant's probation for conduct it could not punish under the state's criminal laws. (*Ibid*.; see *People v. Brooks* (2010) 182 Cal.App.4th 1348, 1351.) *Tilehkooh* is dictum to the extent it sought to reach the propriety of probation conditions under *Lent*, *supra*, 15 Cal.3d 481. (See *People v. Leal*, *supra*, 210 Cal.App.4th 829, 849; *People v. Moret*, *supra*, 180 Cal.App.4th 839, 856 & fn. 16; see *Brooks*, at p. 1351 [*Tilehkooh* "simply conclude[s] that the use of marijuana under the CUA is lawful in California and that such use does not violate the probation condition 'obey all laws' "].) And *Tilehkooh* was decided before the effective date of section 11362.795 (Stats. 2003, ch. 875, § 2, eff. Jan. 1, 2004), which authorizes a trial court to impose a condition of probation that prohibits a defendant from the use of medical marijuana. (*People v. Hughes* (2012) 202 Cal.App.4th 1473, 1480-1481; *Moret*, at p. 856.)

use marijuana, to increased scrutiny. We have already pointed out that if a probation condition serves the statutory purpose of rehabilitation, it necessarily has a reasonable relationship to future criminality and may not be held invalid. (See *People v. Balestra* (1999) 76 Cal.App.4th 57, 65.) Because the marijuana condition relates to reducing future criminality under *Lent,* we conclude the court did not abuse its discretion by imposing it.

V. *Condition 8h Barring Presence at Places Where Alcohol is the Main Item for Sale*

Lynch challenges probation condition 8h, which states that Lynch must "not be in places, except in the course of employment, where you know, or a [probation officer] or other law enforcement officer informs you, that alcohol is the main item for sale." He maintains it has no relationship to his crime, relates to conduct that is not itself criminal and is not reasonably related to future criminality. The People concede that condition should be stricken, and we agree that the condition has no relation to Lynch's present or prior offenses or future criminality. We will modify the order to strike probation condition 8h.

DISPOSITION

The probation order is modified to strike probation condition 8h, preventing Lynch from being present at places where he knows or is informed that alcohol is the main item for sale except in the course of his employment. With that modification, the judgment is affirmed.

O'ROURKE, J.

I CONCUR:

HUFFMAN, Acting P. J.

AARON, J., Concurring and Dissenting.

Lynch hit his neighbor in the face with a bottle after an argument with the neighbor escalated into a physical altercation. Lynch pled guilty to assault and the court sentenced him to probation. One of the conditions of probation requires that Lynch submit his "computers and recordable media" to search at any time, when required by his probation officer or by a law enforcement officer (the electronics search condition). Lynch's counsel objected to this condition on the ground that it bore no relationship to the case. The majority upholds the condition as reasonable under *Lent* on the ground that the condition is reasonably related to future criminality since it will enable Lynch's probation officer to supervise Lynch effectively. The majority further concludes that the condition is not unconstitutionally overbroad, asserting that Lynch "made no showing that a search of his electronic devices would be any more invasive than an unannounced, without-cause, warrantless search of his residence." (Maj. opn., at pp. 15–16.)

Given Lynch's criminal history and his past poor performance on probation, I agree that the condition is reasonably related to future criminality under *Lent* since it will unquestionably enable Lynch's probation officer to more closely monitor his activities to ensure compliance with his conditions of probation. However, I would conclude that the condition is unconstitutionally overbroad as applied to Lynch.

Specifically, I cannot agree with the majority's suggestion that permitting a probation officer unfettered access to a probationer's electronic devices is no more invasive than permitting a warrantless search of the probationer's residence, and the concomitant implication that an unlimited electronics search condition may

constitutionally be imposed on every probationer, essentially as a standard condition, without regard to the nature and circumstances of the offense or the unique needs of the particular probationer with respect to his or her reformation and rehabilitation. The United States Supreme Court has recognized that the data stored on a cell phone is both quantitatively and qualitatively different from records typically stored in one's home. In *Riley v. California* (2014) ___ U.S. ___ [134 S.Ct. 2473] (*Riley*), the Court observed that "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." (*Id.* at p. 2491.) The *Riley* Court explained,

> "Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building. . . . [¶] Mobile application software on a cell phone, or 'apps,' offer a range of tools for managing detailed information about all aspects of a person's life. There are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life. There are popular apps for buying or selling just about anything, and the records of such transactions may be accessible on the phone indefinitely. . . . The average smart

> phone user has installed 33 apps, which, together can form a revealing montage of the user's life." (*Id.* at p. 2490.)

The Court noted, as an illustration of the breadth of information that can be gleaned from a person's cell phone and not from a traditional search, that "[a] person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a cell phone." (*Riley*, *supra*, 134 S.Ct. at p. 2489.) In sum, the *Riley* Court observed that, a cell phone contains "a digital record of nearly every aspect of [a person's] li[fe], from the mundane to the intimate. . . ." (*Id.* at p. 2490.)

The observations of the U.S. Supreme Court in *Riley* make clear that searches of electronic devices provide access to a vast amount of information that extends well beyond the parameters contemplated in a traditional search, and that such searches thus implicate privacy concerns not implicated by a traditional search. The electronics search condition imposed in this case would permit not only unlimited searches of Lynch's cell phone, but presumably, of *any* computer or electronic media belonging to him or in his possession, thus permitting potentially even more intrusive searches than contemplated in *Riley*. Contrary to the majority's suggestion, one may clearly assume, without requiring a showing by the defendant, that a probation condition that would permit unlimited searches of a probationer's electronic devices is significantly "more invasive than an unannounced, without-cause, warrantless search of his residence" (maj. opn., at pp. 15–16), and thus infringes on the probationer's Fourth Amendment rights to a greater degree than would a traditional search of his home.

In *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted Dec. 14, 2016, S238210, a panel of this court asserted that "the privacy concerns voiced in *Riley* are inapposite in the context of evaluating the reasonableness of a probation condition." (*Id.* at p. 1129.) Another panel of the court reiterated this assertion in *People v. Trujillo* (2017) 15 Cal.App.5th 574, 587 (*Trujillo*), review granted Nov. 29, 2017, No. S244650. Citing *Trujillo*, the majority in this case asserts that *Riley* is distinguishable on the basis that "the overbreadth analysis [applicable to a probation condition] is materially different from the warrant requirement at issue in that case." (Maj. opn., at p. 15, citing *Trujillo*, *supra*, at p. 587.) The fact that an arrestee has greater privacy interests than a probationer is clearly true. However, although a probationer admittedly has a *diminished* expectation of privacy, that expectation is not *nonexistent*. (See *People v. Valdivia* (2017) 16 Cal.App.5th 1130, 1146 (*Valdivia*) ["[D]efendant did not entirely surrender his rights under the Fourth Amendment by pleading no contest and accepting probation. The fact that the overbreadth doctrine applies at all to probationers like defendant illustrates this point"]; see also *In re Jaime P.* (2006) 40 Cal.4th 128, 137 ["probationers retain some expectation of privacy, albeit a reduced one"].)

While the *Riley* Court's observations were made in the context of discussing the permissible scope of a warrantless search incident to arrest, its comments concerning the wide range of very personal information stored on a person's cell phone apply with equal force, and are clearly relevant to, an analysis of whether a probation condition that permits perusal of *all* of a person's computers and recordable media, and thus, clearly

significantly impinges on the probationer's Fourth Amendment rights, is in fact narrowly tailored to meet the governmental interest of reformation and rehabilitation.

"A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) A probation condition is "unconstitutionally overbroad . . . if it (1) 'impinge[s] on constitutional rights,' and (2) is not 'tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.' " (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153, quoting *In re Victor L.* (2010) 182 Cal.App.4th 902, 910.) Thus, an electronics search condition should be carefully tailored to the type of electronic data that is reasonably related to the state's interest in fostering rehabilitation and protecting public safety.

In *Valdivia*, *supra*, 16 Cal.App.5th 1130, the defendant pled no contest to inflicting corporal injury on his spouse and was sentenced to probation. One of the conditions of probation permitted warrantless searches of electronic storage devices under the defendant's control and required him to provide necessary passwords to facilitate any such search. The *Valdivia* court concluded that the condition was valid under *Lent* since it would permit the probation officer to ensure that the defendant was obeying all laws. However, the court further concluded that the condition was unconstitutionally overbroad under the Fourth Amendment. In reaching this conclusion, the court stated, "[A]t the same time the electronic storage device search condition serves the state's legitimate interest in monitoring defendant's rehabilitation, it permits

unprecedented intrusion into his private affairs—and it does so on a record that demonstrates little likelihood, or even possibility, that evidence of illegal activity will be found in the devices the condition subjects to a warrantless search." (*Valdivia*, *supra*, at p. 1145.) The *Valdivia* court noted that, as in the present case, the record did not show that electronic devices played any role in the underlying criminal conduct in the case before it, and that there was "nothing in the record to demonstrate that defendant 'use[d] electronic devices for wrongful purposes in the past.' " (*Ibid.*) The court concluded that under such circumstances, there was no substantial reason to believe that evidence of future criminal activity was likely to be found on electronic storage devices under the defendant's control.

I agree with the *Valdivia* court's observation that, "[t]he fact that a person convicted of a felony has agreed to subject himself to the supervision of probation does not, by itself, give the government the right to dig through every aspect of that person's private affairs in search of evidence of criminal activity without any explanation or justification from the government of why such a search has, at the very least, a reasonable possibility of actually *uncovering* such evidence." (*Valdivia*, *supra*, 16 Cal.App.5th at p. 1146.) It is clear that the trial court in this case made no attempt to narrowly tailor the condition to Lynch's individualized situation despite Lynch's objection that the condition bore no relationship to the circumstances of his case or to his reform and rehabilitation for the offense for which he was being sentenced. (See *ibid.* ["A probation condition that infringes on the constitutional rights a probationer otherwise enjoys still must be closely tailored to achieve the legitimate purpose or purposes of that condition"].) On the

contrary, the court indicated that it routinely imposes the condition as "a standard term and condition of probation to monitor probationers."

The trial court's own words demonstrate that it did not tailor the condition to Lynch's circumstances. The majority acknowledges this fact, but states that Lynch "made no showing that a search of his electronic devices would be any more intrusive than an unannounced, without-cause, warrantless search of his residence." (Maj. opn., at pp. 15–16.) The majority concludes that " '[a]bsent particularized facts showing the electronics-search condition will infringe on [Lynch's] heightened privacy interests, there is no reasoned basis to conclude the condition is constitutionally overbroad or to remand for the court to consider a more narrowly-drawn condition.' " (Maj. opn., at p. 16, quoting *Trujillo, supra*, 15 Cal.App.5th at p. 589.)

The observations of the U.S. Supreme Court in *Riley v. California* belie this conclusion. It is clear from the Court's observations in *Riley* that a probation condition that would permit unlimited searches of a probationer's electronic devices unquestionably infringes on the probationer's constitutionally protected privacy interests. Although some intrusion into a probationer's constitutionally protected privacy interests is permissible, given the extent of the intrusion into a person's privacy that a probation condition permitting unlimited searches of a probationer's electronic devices would entail, trial courts must tailor such a condition to the circumstances of the individual defendant to pass constitutional muster.

For these reasons, like the court in *Valdivia*, I would conclude that the electronics search condition "is unconstitutionally overbroad [as applied to the defendant] because its

potential impact on defendant's Fourth Amendment rights exceeds what is reasonably necessary to serve the government's legitimate interest in ensuring that [Lynch] complies with the terms of his probation." (*Valdivia, supra*, 16 Cal.App.5th at p. 1147.) I would vacate the electronics search condition and remand the matter to the trial court to consider Lynch's personal circumstances and to tailor any such condition to those circumstances. I concur in the remainder of the majority opinion.

AARON, J.